93-562

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

E.J. McMANUS AND
ALL OTHERS SIMILARLY SITUATED

Petitioners,

v.

STATE OF IOWA, IOWA DEPARTMENT OF
REVENUE AND FINANCE AND GERALD BAIR,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE IOWA SUPREME COURT

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QUESTIONS PRESENTED

1. Does this court have the power to review this case under the "Plain Statement" Rule?

2. Does McManus have a remedy under 42 U.S.C. §1983 for the recovery of income taxes wrongfully taken from him under **Davis v. Michigan**, 489 U.S. _____, 109 S. Ct. 1500, 103 L Ed. 2d 891?

3. Whether a class action is available here?

4. Whether this court should overrule **Hans v. Louisiana**, 134 U.S. 1, 10 S. Ct. 504, 33 L. Ed. 842 (1890) and **Will v. Michigan**, 491 U.S. 58, 105 L. Ed. 2d 45, 109 S. Ct. 2304 (1989)?

PARTIES TO PROCEEDINGS BELOW

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The opinion of the Iowa Supreme Court here was issued May 19, 1993 and was reported in 499 NW 2d 726 with rehearing denied June 16, 1993. The opinion of the trial court was unreported. The opinions of the Iowa Supreme Court and the trial court are reprinted in the appendix. A decision in a related case called **Hagge v. Department of Revenue** is also reprinted in the appendix.

JURISDICTION

The court has jurisdiction to issue a Writ of Certiorari to the Iowa Supreme Court under 28 U.S.C.A. §1257. Although the Iowa Supreme Court's opinion was entered May 19, 1993, its order of June 16, 1993 denying McManus' Petition for Rehearing means this Petition is timely under this court's Rule 13 and 28 U.S.C.A. §2101(b).

STATEMENT OF THE CASE

Under Rule 14.1(f) the following is a mere citation of the constitutional and statutory provisions which are reproduced verbatim in the appendix as they are lengthy:

4 U.S.C.A §111
42 U.S.C.A. §1983
42 U.S.C.A. §2000d-7(a)(1)
Iowa Code §17A.12(1)
Iowa Code §17A.19
Iowa Code §17A.2
Iowa Code §422.29
Iowa Code §422.73(2)
IAC 701 - 7.8(17A)
IAC 701 - 7.17(17A)
U.S. Const. Amend. 11

E.J. McManus, a U.S. District Court Judge who took senior status, claimed Iowa discriminated in the taxation of his retirement income in violation of the Public Salary Tax Act (4 U.S.C.A. §111) as interpreted by **Davis v. Michigan Department of Treasury**, 489 U.S. ___ 109 S. Ct. 1500 103 L. Ed. 2d 891 (1989).

Similar to the State of Michigan, Iowa began exempting state retirees from state income tax in 1953 through §97B.39 until March 28, 1989 when **Davis v. Michigan** was handed down.

April 15, 1989 McManus submitted a refund request for the taxes he complains of here but the Department of Revenue refused to rule on the issue saying it would neither process nor deny these requests until the issue had been more definitively resolved by cases then pending with this court.

November 28, 1989 McManus filed suit in federal court in Cedar Rapids in an attempt to certify a class, seeking refunds of these taxes and included a claim under 42 U.S.C.A. §1983.

June 14, 1991 the federal district court dismissed McManus' suit under the Tax Injunction Act (28 U.S.C.A. §1341) which prohibits suits against states over taxes in federal court if the

taxpayer has a "plain, speedy and efficient" state remedy, which the district court believed that McManus had.

The Eighth Circuit affirmed April 3, 1991 (see table decision 938 F 2d 185 (1991).

This court denied certiorari October 7, 1991 (112 S. Ct. 84).

November 14, 1991 McManus filed a petition for "judicial review" with the Iowa District Court in Linn County, also seeking a §1983 remedy but February 4, 1992 the trial court dismissed his suit on the ground that he had failed to adequately exhaust his administrative remedies even though the Department of Revenue refused to hear the case.

May 19, 1993 the Iowa Supreme Court affirmed. June 16, 1993 it denied his petition for rehearing.

Another retiree, Arlo Hagge, brought the same claim in Iowa District Court after the Department denied his refund claim August 29, 1991 but here it agreed in writing to hear his claim. He prevailed August 24, 1993.

REASONS FOR GRANTING THE WRIT

Does this court have the power to review this case under the "Plain Statement" Rule?

Harris v. Reed, 489 U.S. 255, 109 S. Ct. 1038, 103 L. Ed. 2d, 308 (1989), in applying the "plain statement rule" to habeas corpus proceedings, alludes to this procedure which evidently is designed for this court's administrative convenience in deciding whether it has the power to entertain Petitions for Certiorari as state courts had been ambiguous over whether they had decided the

case on pure state grounds or had used federal grounds. In order to provide this court the ability to determine such a question the plain statement rule evidently says if the state court says with sufficient clarity its decision rests on independent state grounds then this court is not likely to take review.

As the Iowa Supreme Court decision here rests on a purely state ground then the question arises as to whether this court can even take review as a matter of procedure or appellate "subject matter" jurisdiction.

Two state decisions, **Hogan v. Musolf**, 471 NW 2d 216 (Wis. 1991) cert. den ___ U.S. _____ 112 S. Ct. 867, 116 L. Ed. 2d 773 and **Nutbrown v. Munn**, 811 P. 2d 131 (Or 1991) cert. den ____ U.S. _____ 112 S. Ct. 867, 116 L. Ed. 2d 773 (1992) have conditioned the availability of a 1983 remedy on

the adequacy of a state remedy for tax refunds like that McManus seeks here.

These state court views of this tribunal's decisions over the availability of 1983 remedies in tax situations appear to arise from **Fair Assessment in Real Estate v. McNary**, 454 U.S. 100, 102 S. Ct. 177, 70 L. Ed. 2d 271 (1981). In **Fair Assessment**, Missouri taxpayers complained over state taxation and although they brought state proceedings over it, but not to completion, they brought suit in federal court over the same issues. The question was whether they could maintain such a 1983 suit in federal court, as opposed to state court, because of the different rules that had developed over the availability of 1983 in general, which held state exhaustion requirements were not necessary to bring such suits unless Congress explicitly contemplated them, while complaints over

state taxation were barred in federal court by the Tax Injunction Act, (28 U.S.C.A. 1341) if taxpayers state remedies were "plain, speedy and efficient."

A plurality in **McNary** held these taxpayers suits in federal court were barred by the principle of comity, a concept similar to abstention, that had arisen before the Tax Injunction Act was passed (1937) as a measure of deference to state autonomy while the rest of the court, perhaps another plurality, believed that the Tax Injunction Act alone prohibited these suits in codified terms as the taxpayers in **McNary** failed to completely exhaust their state remedies.

Thus **Hogan** and **Nutbrown** view the federal perception as meaning a 1983 suit, in **state court**, wasn't available if there was an adequate state remedy.

The Iowa Supreme Court decision in McManus' suit holds he must sue in order to sue in order to sue. The Iowa Supreme Court held that after McManus sought the refunds at the administrative level, and the Department of Revenue's refusal to even hear his claim at all (contrary to its own rule and statute) (see p. 43, 44), the only thing he could have judicially reviewed was the Department's mere failure to hear his claim as the definition of agency action in the statute (17A.2(9)) includes an agency's "failure" to act.

Thus after McManus brings his initial claim with the agency, and it refuses to act, he must bring a suit in judicial review over the bare failure to act. If he wins then he goes back down to the administrative agency, the second suit, but here, the Department had already denied at the administrative level the other suit referred to in the

statement of facts involving Mr. Hagge, who raised similar issues. Thus at this point McManus would clearly have a futile proceeding as he would be denied. He would then have to bring another petition for judicial review but this time he would finally be heard on the merits.

McManus believes that this procedure is so extraordinary that this tribunal should not only deem it inadequate but effectively a non-existent state remedy, thus invoking its review powers for purposes of deciding whether the 1983 remedy is available.

Does McManus have a remedy under 42 U.S.C. §1983 for the recovery of income taxes wrongfully taken from him under Davis v. Michigan?

The State of Iowa contended McManus' 1983 claim could not be brought because of state

sovereign immunity. The principal case for the state's position seems to be **Will v. Michigan Department of State Police** 491 U.S. 58, 105 L Ed. 2d 45, 109 S. Ct. 2304 (1989). It cites this case for the proposition that "[N]either a state nor its officials acting in their official capacities are 'persons' under §1983." **Will** also seems to stand for the proposition that states are "immune from §1983 actions.

In **Will**, a 5-4 decision by Justice White, an employee, who sued in Michigan state court, claimed the State of Michigan and other defendants improperly denied him a promotion under provisions, unspecified in the opinion, of the United States and Michigan Constitutions, due to his brother's political affiliations.

Will held the employee could not bring his claim against the state because of State sovereign

immunity or that the state was not a "person" within the meaning of §1983. **Will** based its decision in part on Eleventh Amendment law in 109 S. Ct. 2304, 2309 ¶[2] where it says:

> ". . . in deciphering congressional intent as to the scope of §1983, the scope of the Eleventh Amendment is a consideration, and we decline to adopt a reading of §1983 that disregards it."

The Eleventh Amendment to the United States Constitution provides:

> The Judicial power of the United States shall not be construed to extend to **any suit in law or equity**, commenced or prosecuted against one of the United States by Citizens of **another State**, or by Citizens or Subjects of any **Foreign State**. [emphasis added]

In terms the Amendment withdraws "judicial power" from the **entire** federal court system as to suits against states in federal court by citizens of

other states or foreign countries. Thus the Eleventh Amendment appears to only withdraw "diversity jurisdiction" (as opposed to "federal question jurisdiction") from the federal courts but it has been interpreted as being merely an example of "sovereign immunity," which existed before, and survived, the ratification of the American Constitution. **Hans v. Louisiana** 134 U.S. 1, 10 S. Ct. 504, 33 L Ed 842 (1890), **Principality of Monaco v. Mississippi** 292 U.S. 313, 54 S. Ct. 745, 78 L Ed 1282 (1934).

This "broadening" of the bar of the Eleventh Amendment, by attaching it to sovereign immunity, now apparently covers federal questions as well, see **Atascadero State Hospital v. Scanlon** 473 U.S. 234, 242, 105 S. Ct. 3142, 3147, 87 L Ed 2d 171 (1985). Justice Stevens explains this in **Pennsylvania v. Union Gas** 108 S. Ct. 2273, 2286-

2289. Here Stevens says the cases thus discuss the amendment in terms of state immunity but also in terms of a jurisdictional limitation, particularly based upon the language of the amendment "The **judicial power** . . . shall not be construed to extend . . ." Thus although arguably the amendment only withdraws "diversity jurisdiction" the enlargement of its bar into the amorphous concept of "sovereign immunity" has enormously extended the withdrawal of subject matter jurisdiction so that it now also bars many federal questions as well. However Stevens in **Union Gas** prefers to view this broadening as a non-jurisdictional interpretation of the amendment or one where the judiciary has decided to "weigh" the respective state and federal interests.

The main purpose of Eleventh Amendment law is to prohibit suits against states in **federal**

court and not state tribunals. **Port Auth. Trans. Hudson v. Feeney**, 100 S. Ct. 1868, 1872 rt. col. ¶[3, 4] (1990). Although **Will** used Eleventh Amendment law by way of analogy to prevent the suit there, though brought in state court, it began in 109 S. Ct. at 2307 rt. col. 2d ¶ by observing that ". . . the Eleventh Amendment does not apply in state courts." [citing **Maine vs. Thiboutot**, 448 U.S. 1, 9 n. 7 100 S. Ct. 2502, 2507 n. 7, 65 L Ed. 2d 555 (1980)].

However there are exceptions to the bar of the Eleventh Amendment which are that of "congressional abrogation", "waiver" and the "diversity theory" (the latter has been expressly rejected by the United States Supreme Court in **Welch v. Texas Department of Highways & Pub. Transp**. 107 S. Ct. 2941, 2951 (1987). (**Welch** also justifies the "broadening" of the amendment,

barring federal questions as well, through the amendment's language addressing "any suit in law or equity." 107 S. Ct. @2952 n. 17

The congressional abrogation theory, which says Congress may through federal statute abrogate or abolish this Eleventh Amendment immunity, as long as the statute says this "clearly" enough, appears to be the present state of the law. **Atascadero State Hospital v. Scanlon** 473 U.S. 234, 242, 105 S. Ct. 3142, 3147, 87 L Ed. 2d 171 (1985). This view has been reiterated in **Will** in 109 S. Ct. 2308 rt. col. 1st unnumbered paragraph.

In the present case this sovereign immunity has been abrogated by Congress in Title 42 U.S.C. §2000d-7(a)(1) which states:

> A state shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in **federal court** for a violation of [statutes relating to

> rehabilitation, education, age discrimination and civil rights] or the provisions of **any other federal statute prohibiting discrimination** by recipients of federal financial assistance. [emphasis added]

The "other federal statute prohibiting discrimination" is in Title 4 U.S.C. §111 (the Public Salary Tax Act) which says:

> The United States consents to the taxation of pay or compensation for personal service as an officer or an employee of the United States, a territory or possession or political subdivision thereof, the government of the District of Columbia, or an agency or instrumentality of one or more of the foregoing, by a duly constituted taxing authority having jurisdiction, if the taxation does not **discriminate** against the officer or employee because of the source of the pay or compensation. [emphasis added]

Although Title 42 U.S.C. §2000d-7(a)(1) abrogates Eleventh Amendment immunity in federal

court, as opposed to state court, and if in fact this immunity somehow applies in the present state suit, then the anomalous result will be that although Iowa could have been sued in federal court, it can't be sued in state court over the same issues. (McManus' federal suit was dismissed only under the Tax Injunction Act which prohibits suits in federal court against states over taxes where the taxpayer has a "plain, speedy and efficient" state remedy).

Although Title 42, U.S.C. §2000d-7(a)(1) removes this immunity in federal courts as to the provisions of any other federal statute prohibiting discrimination, it continues that this relates to "recipients of federal financial assistance." Literally, then, this statute applies as the State of Iowa is indeed a recipient of federal financial assistance.

Fitzpatrick v. Bitzer, 427 U.S. 445, 96 S. Ct. 2666, 49 L Ed. 2d 614 (1976), held a state could be sued for money damages over the discriminatory treatment of male employees under the 1972 amendments to Title VII of the Civil Rights Act despite the Eleventh Amendment. Justice Rehnquist, writing for the majority (Brennan and Stevens concurred for different reasons) reversed the lower courts, reasoning in 427 U.S. at 456, 96 S. Ct. at 2671 (rt. col. ¶1-3):

> When Congress acts pursuant to §5 [of the Fourteenth Amendment] not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of the constitutional amendment whose other sections by their own terms embody limitations on state authority.

He concludes immediately thereafter that Congress in determining the "appropriate

legislation" for enforcing the Fourteenth Amendment may provide for private suits against states.

This authority granted Congress to abrogate the state's Eleventh Amendment immunity through statute seems to stem from the word "enforce" of Section 5 of the Fourteenth Amendment which grants Congress the authority to "enforce" the provisions of that "Article". Thus this ability to "enforce" the sections of the amendment that in terms embody limitations on state authority (by prohibiting states, so named, from doing certain things) is the textual source of this authority. One might view this section as being able to further amend the Eleventh Amendment.

The "necessary and proper" clause of Article I Section 8 has been thought to do the same thing, as that clause, similarly to Section 5 of the Fourteenth

Amendment, provides, in its last paragraph, that Congress shall have power "To make all Laws which shall be necessary and proper for carrying into Execution of the foregoing Powers . . .". **Pennsylvania vs. Union Gas** 109 S. Ct. 2273 (1989).

Although Title 42 U.S.C. §2000d-7(a)(1) appears to have been enacted under Section 5 of the Fourteenth Amendment, due to its reference to statutes on discrimination and civil rights, it arguably also has authority simultaneously coming from Article I, Section 8. [Justice Stevens recognizes this possibility in Fitzpatrick in 427 U.S. at 458, 96 S. Ct. at 2672 (rt. col.)] The same can be said of Title 4 U.S.C. §111 as it uses the term "discriminate" but it also incorporates the United States Supreme Court's Constitutional doctrine of

intergovernmental tax immunity, (from Article I §8) **Davis v. Michigan** 103 L Ed 2d 903-904.

The Public Salary Tax Act is also alone sufficient to abrogate this immunity since when it authorizes the taxation of federal employee' salaries "by a duly constituted taxing authority" it must necessarily only contemplate **states** by its terms since only those entities have the power to tax.

Thus, contrary to Iowa's assertion in its motion to dismiss, the state here is indeed a person within §1983 or, in the alternative, has had its immunity abrogated through express terms in congressional enactments.

Although **Will** says §1983 cannot abrogate this immunity, it really means the **substantive** federal laws for which §1983 grants a civil remedy, at issue in **Will**, failed to sufficiently abrogate this immunity.

It must be remembered the substantive federal law the employee claimed violated in **Will** was from the U.S. Constitution, though unspecified in the opinion. Thus there was **no federal statute** to abrogate immunity.

Since the substantive statutes involved here, 42 U.S.C. §2000d-7(a)(1) and 4 U.S.C. §111, in terms abrogate this immunity then the state is a "person" and, thus, not immune, in the present suit and, not only for purposes of McManus' individual claim under §1983, but also for purposes of the class action.

Whether a class action is available here?

About the same time McManus was claiming his refunds in these proceedings Arlo Hagge, another federal retiree, did so as well in a separate case but here Hagge managed to enter into a

written agreement with the Department where the Department agreed to hear his case on the merits at the administrative level. In McManus' case the state has always contended that the **Hagge** case should be the only one used to litigate these issues. It has continuously styled this as a "test case," but there is no law determining what this concept means, contrary to a class action which is explicitly described in Iowa Rule of Civil Procedure 42.1 et seq.

Iowa prohibits class actions at the administrative level in **Quaker Oats Co. v. Cedar Rapids Human Rights Com'n.**, 268 NW 2d 862 @ 867 rt col ¶[8] (Iowa 1970).

In the **Hagge** "test case" the Department's order at its level, denying Hagge his refund claim, handed down August 29, 1991, provides in the first page in the second unnumbered paragraph in part:

> . . . if retroactive relief is ordered, the state reserves its right to select a retroactive relief or remedy which achieves consistent treatment but which **may not be refunds**. [emphasis added]

In this same order at the same page but in the third unnumbered paragraph **Hagge** offered into evidence portions of a "stipulation of the parties" which was received by the Department May 10, 1991 and provides in paragraph 12 at page 7:

> The Department agrees and stipulates that it will be bound by a final decision in these proceedings as to any other federal **civil service** retiree who timely files a claim for refund of Iowa income tax paid on his or her federal retirement income, irrespective of the year to which such amended return relates. [emphasis added].

E.J. McManus is an Article III District Court Judge and is thus not part of such federal civil service. Nor would be military retirees or any

number of other categories of federal retirees. Therefore under the express written agreement Iowa has with Hagge, McManus and many other retirees are not covered.

The Iowa Supreme Court in **Hagge** ordered Iowa to refund his taxes and the opinion can be read as requiring refunds to all other federal retirees.

McManus admits that in conversations with Hagge's counsel it appears the state is considering a special session of the legislature to enact a statute to provide refunds to all civil service retirees and other retirees but this has not yet happened and, even if it does, will occur long after McManus' time for filing certiorari elapses (September 14, 1993).

However, even if all of this is true, despite the observations above, the eventual result of the federal view of these issues in **Harper v. Virginia**,

113 S. Ct. 2510 (1993) coupled with the Iowa Supreme Court's decision in **Hagge** itself, clearly shows that the decisions ordering refunds are to be considered retroactive in nature, meaning that Iowa has been wrong all along, at least on the merits, concerning McManus, the class, and Mr. Hagge.

Whether this court should overrule Hans v. Louisiana, 134 U.S. 1, 10 S. Ct. 504, 33 L. Ed. 842 (1890) and Will v. Michigan, 491 U.S. 58, 105 L. Ed. 2d 45, 109 S. Ct. 2304 (1989)?

The Eleventh Amendment is at issue here though the proceedings come from state court as **Will** has imported this into a 1983 case. Although this court usually adheres to stare decisis, it is adhering to a legal doctrine that is in hopeless confusion. The Eleventh Amendment's withdrawal of judicial power in terms applies to even this

tribunal, even as to federal questions, but the only reason this was rejected was to avoid the incoherence resulting from there being as many views of federal law as there were states. **Cohens v. Virginia**, 6 Wheat. 264, 5 L. Ed. 257 (1821), **McKesson v. Florida**, 110 S. Ct. 2238 (1990).

The amendment's analogue to Article III's federal question or "arising under" language, which is "any suit in law or equity," only describes the procedural vehicle for determining substantive issues, not the substantive federal questions themselves. It is hardly the same language as is the diversity language the amendment incorporates from Article III.

Hans' extension of the amendment's immunity, by deeming it merely an example of it, is an extraordinarily untextual analysis of the amendment. Justice Stevens' view of the

amendment in **Pennsylvania v. Union Gas**, 108 S. Ct. 2273, 2286-2289, is more in keeping with a coherent view and probably advocates the "diversity theory" of the amendment which this court should adopt.

CONCLUSION

If there is an Eleventh Amendment branch and a non-Eleventh Amendment branch to state immunity in 1983 claims, then 42 U.S.C.A. §2000d-7A1 abrogates the Eleventh Amendment branch and the Public Salary Tax Act (4 U.S.C.A. §111) abrogates the non-Eleventh Amendment branch just as the Fourteenth Amendment was able to do to the Eleventh in **Fitzpatrick v. Bitzer**. If this court believes 1983's language "person" doesn't include states under the non-Eleventh Amendment

branch, its continued language "and laws" textually embraces both of these statutes.

Even if this court believes McManus will get his refunds through stare decisis in **Hagge**, no one yet really knows whether this will happen. Even if he does McManus has been *procedurally* wronged through the state's obstructive position in interpreting its own rules for purposes of an "adequate" state remedy. McManus should have been able to litigate this issue on his own. The state should not have been allowed to arbitrarily decide that only the **Hagge** case could be used as a vehicle to decide these issues.

This court should order a refund through the 1983 remedy and attorney fees under 1988.

APPENDIX

STATUTES

Title 28 U.S.C.A. §1983, the "Civil Rights Act" provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Title 42 U.S.C.A. §2000d-7(a)(1) states:

> A State shall not be immune under the Eleventh Amendment of the Constitution of the United States

> from suit in Federal Court for a violation of [statutes relating to Rehabilitation, Education, Age Discrimination and Civil Rights] or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.

Title 4 U.S.C.A. §111 provides:

> The United states consents to the taxation of pay or compensation for personal service as an officer or employee of the United States, a territory or possession or political subdivision thereof, the government of the District of Columbia, or an agency or instrumentality of one or more of the foregoing by a duly constituted taxing authority having jurisdiction, if the taxation does not discriminate against the officer or employee because of the source of the pay or compensation.

Section 17A. 19 of the Iowa Code provides:

> 1. A person or party who has exhausted all adequate administrative remedies and who is aggrieved or adversely affected by any final agency action is entitled to

judicial review thereof under this chapter.

. . .

3. If a party files an application . . . for rehearing with the agency, the petition for judicial review must be filed within thirty days after that application had been denied or deemed denied. If a party does not file an application . . . for rehearing, the petition must be filed within thirty days after the issuance of the agency's final decision in that contested case.

Section 17A. 2 of the Iowa Code provides:

As used in this chapter

. . .

9. "*Agency action*" includes the whole or a part of an agency rule or other statement of law or policy, order, decision, license, proceeding, investigation, sanction, relief, or the equivalent or a denial thereof, or a failure to act, or any other exercise of agency discretion or failure to do so, or the performance of any agency duty or the failure to do so."

Section 17A.12(1) of the Iowa Code provides:

> . . . all parties shall be afforded an opportunity for hearing . . .

Section 422.73(2) of the Iowa Code provides:

> If it appears that an amount of tax . . . has been paid which was not due under division II [on income taxes] . . . of this chapter, then, . . . that amount shall be refunded to the person . . .

Section 422.29 provides:

> 1. Judicial review of actions of the director may be sought in accordance with the terms of the Iowa Administrative Procedure Act.
>
> . . .
>
> 2. The petitioner shall file with the clerk a bond for the use of the respondent, with sureties approved respondent, with sureties approved by such clerk, in penalty at least double the amount of tax appealed from . . .

IAC [Iowa Administrative Code] §701-7.8(17A) provides:

> Protests. Any person wishing to contest an assessment, refund claim, or any other department action, . . . shall file a protest, in writing, with the department . . . to the director for a hearing. . . .

In Rule 701 - 7.17(17A) of the Department of Revenue entitled "Contested Case Proceedings" it is said:

> Unless the parties to a contested case proceeding have, by written stipulation representing an informal mutual consent, waived the provisions of the Act relating to such proceedings, contested case proceedings shall be initiated and culminate in an evidentiary hearing open to the public.

CONSTITUTIONAL PROVISIONS

The Eleventh Amendment to the United States Constitution provides:

> The Judicial power of the United States shall not be construed to

extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

February 4, 1992 the state trial court issued the following ruling (EQ 15410) in McManus' case:

IN THE IOWA DISTRICT COURT IN AND FOR LINN COUNTY

E.J. McMANUS ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED,	No. EQ 15410
Plaintiff,	RULING
vs.	
STATE OF IOWA, DEPARTMENT OF REVENUE AND FINANCE, and GERALD D. BAIR,	
Defendants.	

This matter comes before the Court for hearing on Defendant's Motion to Dismiss on

January 17, 1992. Counsel for the parties did not appear and the matter was submitted on the written motion and resistance. Upon consideration of this matter, the Court enters the following Ruling.

Plaintiff E.J. McManus filed this class action for judicial review against Defendants State of Iowa, Department of Revenue and Finance and its Director Gerald Bair. The proposed class consists of federal retirees whose retirement income was taxed by the State of Iowa. Plaintiff seeks a refund of his Iowa income tax paid on his retirement income from the Defendants. Plaintiff alleges that he has initiated the proper procedure to apply for a refund from the Defendant Department. He alleges further that the Department has refused to process his request for a refund.

Defendants contend that they are awaiting a more definitive ruling on this issue of refunds for federal retirees. The Department has decided a test case which is now on judicial review. Defendants contend that they will be bound by the Iowa Supreme Court ruling on this test case in regard to all other pending federal retiree cases. Plaintiff apparently does not want to wait and requests that this Court declare his right to a refund of his taxes. Plaintiff also alleges a claim against Defendants based on 42 U.S.C. Section 1983.

Defendants have filed a Motion to Dismiss this action contending that this Court lacks subject matter jurisdiction over Plaintiff's claims because he has failed to exhaust his administrative remedies. Defendants also contend that this Court does not have jurisdiction over Plaintiff's claims brought pursuant to Section 1983.

Plaintiff has filed this action under Iowa Code Chapter 17A which provides for judicial review of administrative action. In the present case there is no final agency action to be reviewed by this Court. Before seeking judicial review, a plaintiff must exhaust all administrative remedies. Alberhasky v. City of Iowa City, 433 N.W. 2d 693, 695 (Iowa 1988). This requirement also applies to constitutional challenges so long as the constitutional issue affects a matter pending before the agency. Shell Oil Co. v. Bair, 417 N.W. 2d 425, 430 (Iowa 1987). Exceptions to the exhaustion requirement are only applied if the administrative remedy is inadequate or its pursuit would be fruitless. Alkerhasky, 433 N.W. 2d at 695. In the present case, there is an adequate administrative remedy available through the contested case procedure under Iowa Code Section 422.28 and

422.29. Plaintiff has not followed this procedure to exhaust his administrative remedies and to develop a record for this Court to review. The Court therefore lacks jurisdiction of this petition for judicial review.

Plaintiff must also be required to exhaust his administrative remedies before bringing his Section 1983 claim. In Nutbrown v. Munn, 811 P. 2d 131, 137-38 (Or. 1991), the court held that federal retirees must be required to exhaust their administrative remedies in regard to tax refunds before bringing a Section 1983 action. A similar result was reached in Hogan v. Musolf, 471 N.W. 2d 216, 220 (Wis. 1991), where the court required exhaustion of administrative remedies by federal retirees before brining their Section 1983 claim so long as the administrative remedies are fair, adequate and complete. This Court finds that there

is an adequate administrative remedy available to Plaintiff through the contested case and judicial review process. Plaintiff should exhaust this procedure before bringing his Section 1983 claims.

This Court concludes, for the reasons stated above, that it lacks subject matter jurisdiction over Plaintiff's claims. Defendants' Motion to Dismiss should therefore be granted.

IT IS THEREFORE ORDERED that Defendants' Motion to Dismiss Plaintiff's Petition is granted.

Dated this 4th day of February, 1992.

Larry J. Conmey, Judge
Sixth Judicial District of Iowa

May 19, 1993 the Iowa Supreme Court issued the following decision (No. 173/92-727) in McManus' case:

IN THE SUPREME COURT OF IOWA

No. 173/92-727

Filed May 19, 1993

E.J. McMANUS, On Behalf of Himself and All Others Similarly Situated,

Appellant,

vs.

STATE OF IOWA, DEPARTMENT OF REVENUE AND FINANCE and **GERALD D. BAIR.**

Appellees.

Appeal from the Iowa District Court for Linn County, Larry J. Conmey, Judge.

Retired federal employee appeal from order dismissing his petition for judicial review under Iowa Code section 17A.19 (1991) and for damages under 42 U.S.C. §1983. AFFIRMED.

David P. McManus of Glauson, Grove, Sole & McManus, Cedar Rapids, for appellant.

Bonnie J. Campbell, Attorney General, Harry M. Griger, Special Assistant Attorney General, and Marcia Mason, Assistant Attorney General, for appellees.

Considered by Larson, P.J., and Schultz, Neuman, Snell, and Andreason, JJ.

LARSON, J.

E.J. McManus is a retired federal employee whose retirement benefits were subjected to Iowa income tax at a time when state employees' retirement benefits were exempted. The United States Supreme Court, in Davis v. Michigan Department of Treasury, 489 U.S. 803, 817, 109 S. Ct. 1500 _____, 103 L. Ed. 2d 891, 906 (1989), ruled that this disparate treatment of retirement income violated the Federal Public Salary Tax Act of 1939, 4 U.S.C. §111.

Effective January 1, 1989, Iowa's tax statute was amended to end this preferential treatment, but McManus requested a refund of the income tax he had paid on his retirement income before the statutes were amended. The Iowa Department of Revenue (department) declined to allow or deny the refund until the retroactivity of Davis was determined.

McManus filed a suit in the United States District Court as a class action, seeking refunds of the taxes allegedly overpaid to him and other federal retirees. The federal court dismissed McManus' suit on the ground that it lacked subject matter jurisdiction under the Federal Tax Injunction Act, 28 U.S.C. §1431, which prohibits suits against states over taxes in federal court as long as the taxpayer has a "plain, speedy, and efficient" state rememdy.

McManus appealed to the Eighth Circuit, but his appeal was dismissed without opinion. His petition for writ of certiorari to the United States Supreme Court was denied. McManus then filed this petition for judicial review in the Iowa District Court in which he requested a refund of the income tax paid on his retirement benefits and requested damages and attorney fees under 42 U.S.C. §1983. The district court dismissed his case, and we affirm.

Iowa Code section 17A.19 (1991) provides judicial review only to "[a] person or party who has exhausted all adequate administrative remedies and who is aggrieved or adversely affected by any final agency action." The department argues, and the district court found, that McManus had not exhausted all adequate administrative remedies, and there has been no "final agency action" for the court to review.

McManus responds that the department's failure to act on his refund request denies him an adequate administrative remedy, and he is therefore "relieved" from the exhaustion requirement. See Salisbury Lab v. Iowa Dep't of Envtl. Quality, 276 N.W. 2d 830, 836 (Iowa 1979):

> The doctrine of exhaustion of administrative remedies has never been thought to be absolute. If the agency is incapable of granting the relief sought during the subsequent administrative proceedings, a fruitless pursuit of these rememdies is not required.

(Citations omitted.)

McManus claims that any administrative remedy is inadequate because, he believes, the agency would simply deny his claim for refund anyway. However, the exhaustion requirement of section 17A. 19 will be waived sparingly, and even an inadequate administrative remedy still must be

exhausted if judicial review from the final action is adequate. Salisbury, 276 N.W. 2d at 837.

While "irreparable harm" may obviate the exhaustion rquirement under Iowa's Administrative Procedure Act, id., and under the federal act, Mathews v. Eldridge, 424 U.S. 319, 331-32, 96 S. Ct. 893, 901, 47 L. Ed. 2d 18, 31 (1976), McManus does not claim irreparable harm.

The department's reason for refusing to either allow or deny McManus' refund request is that the department is awaiting decisions by the United States Supreme Court in Harper v. Virginia, 241 Va. 232, 401 S.E. 2d 868 (1991), cert. granted, ____ U.S. ____, ____ S Ct. ____, 118 L. Ed. 2d 541 (1992), and by this court in Hagge v. Iowa Department of Revenue and Finance, No. 92-1377.

Hagge is a test case brought pursuant to an agreement between the department and a group

representing federal retirees. Hagge applied for a refund, which was denied. Hagge exhausted his administrative remedies, then sought judicial review. The district court reversed the agency action. The depatment appealed, and that case is now pending in this court.

The Harper case, which was argued to the United States Supreme Court in December 1992, and the Hagge case present the same basic issue: Whether the holding of Davis, which invalidated Iowa's disparate treatment of state and federal retirement income, is to be applied retroactively. Similar cases decided by the United States Supreme Court since Davis, it was hoped, would provide clear directions to the states, but they have not done so. See James B. Beam Distilling Co. v. Georgia, 501 U.S. ____, 111 S. Ct. 2439, 115 L. Ed. 2d 481 (1992); McKesson v. Division of Alcholic

Beverage & Tobacco, 495 U.S. ____, 110 S. Ct. 2238, 110 L. Ed. 2d 17 (1990).

McManus agrues that exhaustion is not a realistic requirement in this case because the department has failed to either grant or deny his application for refund. The depatment responds that McManus could remedy that situation by simply asking for judicial review of agency action, which is defined by our Administrative Procedure Act to include a failure to act. See Iowa Code §17A. 2(9):

> "Agency Action" includes the whole or a part of an agency rule or other statement of law or policy, order, decision, license, proceedings, investigation, sanction, relief, or the equivalent or a denial thereof, or a failure to act, or any other exercise of agency discretion or failure to do so, or the performance of any agency duty or the failure to do so.

(Emphasis added.)

We agree with the district court that McManus may not prosecute this action for judicial review because he has failed to show that he has exhausted all adequate state remedies.

McManus' §1983 case must also fail, according to the department, because (1) the state and the revenue department are not "persons" under §1983, see Will v. Michigan Dep't of State Police, 491 U.S. 58, 71, 109 S. Ct. 2304, ____, 105 L. Ed. 2d 45, 58 (1989); and (2) a §1983 claim is not allowed if there is an adequate state administrative remedy available, see Nutbrown v. Munn, 311 Or. 328, ____, 811 P. 2d 131, ____ (1991), cert. denied, ____ U.S. ____, 112 S. Ct. 867, 116 L. Ed. 2d 773 (1992) (suit filed by federal retirees for state refund under Davis); Hogan v. Musolf, 163 Wis. 2d 1, ____, 471 N.W. 2d 216, 225-26 (1991), cert.

denied, ____U.S. ____, 112 S. Ct. ____, 116 L. Ed. 2d 773 (1992) (same).

The district court properly dismissed the claim under §1983 because there are adequate state remedies, and McManus failed to exhaust them. We need not address the question of whether the department in this case is a "person" for purposes of §1983.

Because we conclude that any suit attempting to recover the refund or damages under §1983 is premature for the reasons discussed, additional issues raised by McManus that rest on his ability to maintain this action are moot.

AFFIRMED

June 16, 1993 the Iowa Supreme Court issued the following order denying McManus' petition for rehearing:

IN THE SUPREME COURT OF IOWA

No. 92-727

O R D E R

E.J. McMANUS, On Behalf of Himself and All Others Similarly Situated,

Appellant,

vs.

STATE OF IOWA, DEPARTMENT OF REVENUE AND FINANCE and **GERALD D. BAIR,**

Appellees.

After consideration by the court, en banc, appellant's Petition for Rehearing in the above-captioned case is hereby overruled and denied.

Dated this 16th day of June, 1993.

THE SUPREME COURT OF IOWA

Arthur A. McGiverin
Chief Justice

July 21, 1993 the Iowa Supreme Court issued the following decision in the case of Arlo Hagge v. Iowa Department of Revenue and Finance No. 233/92-1377:

IN THE SUPREME COURT OF IOWA

No. 233 / 92-1377

Filed July 21, 1993

ARLO H. HAGGE,

Appellee,

vs.

IOWA DEPARTMENT OF REVENUE AND FINANCE,

Appellant.

Appeal from the Iowa District Court for Linn County, Lynne E. Brady, Judge.

Department of revenue challenges district court order directing refund of Iowa income taxes

paid pursuant to unconstitutional tax scheme. AFFIRMED AS MODIFIED.

Bonnie J. Campbell, Attorney General, Harry M. Griger, Special Assistant Attorney General, and Marcia Mason, Assistant Attorney General, for appellant.

Gary J. Streit and Diane Kutzko of Shuttleworth & Ingersoll, P.C., Cedar Rapids, for appellees.

Considered en banc.

NEUMAN, J.

This appeal concerns the remedy available to taxpayers aggrieved by Iowa's former income tax scheme which taxed federal government employees' pensions but not those of state employees. Reversing a department of revenue decision, the district court on judicial review ordered refunds on

timely-filed amended returns. We affirm but modify the judgment to permit installment payments.

I. Background. In Davis v. Michigan Department of Treasury, 489 U.S. 803, 817, 109 S. Ct. 1500, 1508-9, 103 L. Ed. 2d 891, 906 (1989), the United States Supreme Court held that states like Iowa could not lawfully impose taxes on the pensions of retired federal employees so long as state employees' retirement benefits were exempt. The practice, it held, violated the constitutional doctrine of intergovernmental tax immunity. Id., 109 S. Ct. at _____, 103 L. Ed. 2d at 906. Left unclear was the question whether Davis' mandate would operate retroactively, thereby compelling states to refund income taxes already collected. See id., 109 S. Ct. at _____, 103 L. Ed. 2d at 906 (state conceded propriety of refund under those circumstances; Court stated "to the extent

appellant has paid taxes pursuant to this invalid tax scheme, he is entitled to a refund").

Plaintiff Arlo Hagge, a former United States government employee who retired in 1969, responded to Davis by timely filing amended returns for 1985-88, claiming a refund of state income taxes he paid in those years. The Iowa Department of Revenue (department) denied Hagge's request for refund, asserting its view that Davis would not be applied retroactively. It also maintained that repeal of the offending tax scheme offered prospective relief that obviated the need to refund taxes "voluntarily" paid before the statute was invalidated.

Hagge protested the department's decision and the case was submitted directly to Gerald Bair, director of revenue and finance, on a stipulated factual record. That record recited not only Hagge's

claimed refund for Iowa income taxes paid during the years in question ($10,137.65) but the state's estimated refund liability to other Iowa federal employees were Davis applied retroactively ($40 to 45 million). Applying the three-prong test for retroactively announced in Chevron Oil Co. v. Huson, 404 U.S. 97, 106-07, 92 S. Ct. 349, ____, 30 L. Ed. 2d 296, 306 (1971), the director determined that, under this record, the equities favored prospective rather than retroactive application of Davis. Hagge was thus denied the refund he sought.

Hagge petitioned for judicial review in the district court in accordance with Iowa Code section 17A. 19 (1989). The district court, noting that judicial decisions generally operate both retroactively and prospectively, reversed the

director's decision. This appeal by the department of revenue followed.

The department raises three issues on appeal. It argues that (1) Davis should be applied prospectively only; (2) refunding taxes collected on pre-Davis federal pension income would be inequitable to the state and its taxpayers and, hence, an inappropriate remedy; and (3) federal retirees are not entitled to refunds based on Iowa Code section 422.73(2).[1] We shall consider these arguments in turn.

II. Retroactivity. Since the submission of this appeal, the Supreme Court has decided the retroactivity question adverse to the department. In Harper v. Virginia Department of Taxation, ____

---

[1] The statute provides in pertinent part:

If it appears that an amount of tax, penalty or interest has been paid which was not due . . . [then] that amount shall be refunded to the person [or credited to tax that may become due].

U.S. ____, ____, ____ S. Ct. ____, ____, ____ L. Ed. 2d ____, ____ (1993), the Supreme Court reversed the Virginia Supreme Court's refusal to apply Davis retroactively. Casting serious doubt on the vitality of Chevron's retroactivity analysis, the Court announced the following rule:

> When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule. This rule extends Griffith's ban against "selective application of new rules." Mindful of the basic norms of constitutional adjudication" that animated our view of retroactivity in the criminal context, we now prohibit the erection of selective temporal barriers to the application of federal law in noncriminal cases. In both civil and criminal cases, we can scarcely permit " the substantive law [to] shift and spring"

> according to " the particular equities of [individual parties'] claims" of actual reliance on an old rule and of harm from a retroactive application of the new rule.

Id. at _____, _____ S. Ct. at _____, _____ L. Ed. 2d at (citations omitted). The Court further rejected Virginia's attempt to assert its own doctrine of retroactivity, stating that under the Supremacy Clause of the United States Constitution, "[w]hatever freedom state courts may enjoy to limit the retroactive operation of their own interpretations of state law, cannot extend to their interpretations of federal law." Id. at _____, _____ S. Ct. at _____, _____ L. Ed. 2d at _____ (citations omitted).

Harper controls our decision on the retroactivity issue, leaving the department no basis to challenge the district court's ruling on this aspect of the case.

III. Remedy. While the Harper Court decided that Davis must be applied retroactively to the tax years at issue in Harper's refund action, the Court stopped short of entering judgment for the petitioners. Instead it observed that the Constitution requires only that states provide relief "consistent with federal due process principles." Harper, ___ U.S. at ____, ____ S. Ct. at ____, ____ L. Ed. 2d at ____. Citing McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, 496 U.S. 18, 110 S. Ct. ____, 110 L. Ed. 2d 17 (1990), the Court summarized the test for procedural sufficiency this way:

> If Virginia "offers a meaningful opportunity for taxpayers to withhold contested tax assessments and to challenge their validity in a predeprivation hearing," the "availability of a predeprivation hearing constitutes a procedural safeguard . . . sufficient by itself to satisfy the Due Process Clause." On

> the other hand, if no such predeprivation remedy exists, "the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation." In providing such relief, a State may either award full refunds to those burdened by an unlawful tax or issue some other order that "create[s] in hindsight a nondiscrimatory scheme."

Harper, ____ U.S. at ____, ____ S. Ct. at ____, ____ L. Ed. 2d at ____ (citations omitted). The Court them amplified its analysis by suggesting that adequate "predeprivation process" would be satisfied if a state "authoriz[ed] taxpayers to bring suit to enjoin imposition of a tax prior to its payment, or by allowing taxpayers to withhold payment and then interpose their objections as defenses in a tax enforcement proceeding." Id., ____ S. Ct. at ____, L. Ed. 2d at ____ (quoting

McKesson), 496 U.S. at 36-37, 110 S. Ct. at ____, 110 L. Ed. 2d at 36).

In the case before us, the district court found that Hagge had no "real" predeprivation remedy. The record reveals that for at least a decade before this action arose, Hagge regularly voiced his dissatisfaction with this discrimatory tax scheme to legislators and tax officials alike. The court observed, however, that Hagge was effectively limited to this letter writing campaign because "failure to pay the tax would have subjected him to even further difficulties."

We agree. Although the department argues strenously that Hagge could have long ago brought suit under Iowa Rules of Civil Procedure 261 and 266 to enjoin the unconstitutional collection of state income tax on his federal pension, we

seriously question whether such process would qualify as "meaningful" under a McKesson analysis.

The department cites only one case, Atchison, Topeka & Santa Fe Railway Co. v. Bair, 338 N.W. 2d 338 (Iowa 1983), cert. denied, 465 U.S. 1071 (1984), in support of its claim that equitable relief would have been available to Hagge and other taxpayers. Atchison involved a suit by seven major railway companies to enjoin the department from collecting a special excise tax on fuels in alleged violation of federal legislation. Although the opinion recites that the plaintiff railroads filed their petition in equity, see id. at 342, no further reference is made to this procedural detail. We are persuaded that the department's consent to the procedure was motivated more by desire to promptly resolve a well-orchestrated statutory challenge than by belief

that equitable relief is ordinarily available to tax protesters.

More recently -- and perhaps more realistically -- the department has strongly resisted efforts by taxpayers to seek relief in district court without exhausting administrative remedies. See, e.g., McManus v. Iowa Dep't of Revenue & Fin. 499 N.W. 2d 726, 727 (Iowa 1993). Moreover, this court observed in Shell Oil Co. v. Bair, 417 N.W. 2d 425, 429 (Iowa 1987), that where a constitutional issue directly affects a matter pending before an agency, petitioners are not ordinarily permitted to bypass agency proceedings by bringing an original action in district court. Although the rule did not defeat the petitioner's action in Shell because the agency "acquiesced in the filing of an original declaratory judgment action in the district court," see id. at 430, we noted that "administrative exhaustion

should ordinarily precede a judicial inquiry into the statute's validity." Id. at 429. Finally, we note that the position taken here by the department is essentially contrary to that advanced in Schroeder Oil Co. v. Iowa Department of Revenue and Finance, 458 N.W. 2d 602, 604 (Iowa 1990), where we held that absence of predeprivation hearings in the taxing context is amply justified by the practicalities of tax collection. We observed that allowing such hearings would paralyze tax collection efforts and potentially throw the government into chaos. Id.

Within the more customary channels for protesting tax assessments, the department cites neither statute not administratitve rule that would permit taxpayers to "withhold payment and then interpose their objections as defenses in a tax enforcement proceeding." McKesson, 496 U.S. at

37, 110 S. Ct. at _____, 110 L. Ed. 2d at 36. To the contrary, for the tax years relevant to Hagge's amended returns, Iowa's tax code required any person disputing an assessment to pay "all tax, interest and penalty pertaining to the disputed assessment prior to the commencement of the contested case" or post a bond in a comparable amount. Iowa Code §421.8A (1987) (emphasis added). We note that the statute was struck down as unconstitutional in Schroeder, 458 N.W. 2d at 604, and ultimately repealed, see 1990 Iowa Acts ch. 1232, §22. But we are convinced that, by McKesson standards, tax payment in Iowa continues to be less "voluntary" than "under duress." See McKesson, 496 U.S. at 38 n. 21, 110 S. Ct. at _____ n. 21, 110 L. Ed. 2d at 37 n. 21 (taxes paid in order to avoid financial sanction or seizure of real property are paid under "duress";

payments tendered under a system that permits taxpayers to withhold contested tax assessments and challenge their validity in a predeprivation hearing are "voluntary").

For example, Iowa Code section 422.25(2) provides a penalty of seven and one-half percent for failure to pay ninety percent of the tax due when filing the return. See also 701 Iowa Admin. Code 10.41(3), (5) (adjusting computation of penalty under section 422.25(2) depending on taxable year). Section 422.26 grants the state a tax lien on all of a taxpayer's property for failure to pay assessments when due. And, of course, interest accrues on all unpaid taxes at a rate tied to the prime. See Iowa Code §421.7(2).

For these reasons we reject the department's contention that Iowa affords its taxpayers suffficient predeprivation relief to satisfy the minimum

requirements of due process and may thereby avoid the "clear and certain remedy" of refund dictated by McKesson. 496 U.S. at 39, 110 S. Ct. at ____, 110 L. Ed. 2d at 37. We likewise reject the department's argument that Hagge paid his state income taxes voluntarily and cannot now claim a refund under section 422.72(3) for taxes not "due" when paid. Cf. General Elec. Co. v. Iowa State Bd. of Tax Review, 492 N.W. 2d 417, 421 (Iowa 1992) (taxes paid under compromise were voluntary, thereby precluding later refund under section 422.72(3) for taxes "not due").

The department also tries to avoid its refund obligation by arguing the alleged inequity of imposing an onerous fiscal burden on the state in order to remedy the relatively modest deprivations suffered individually by Iowans who are also federal retirees. But equity cannot override the clear

commands of the Due Process Clause outlined in Harper and McKesson. Because the state has exacted taxes from its citizens pursuant to an unconstitutional tax scheme, it must afford taxpayers a meaningful opportunity to secure postpayment relief. McKesson, 496 U.S. at ____, 110 S. Ct. at ____, 110 L. Ed. 2d at 26-27; accord Burlington N. R.R. Co. v. Board of Supervisors, 418 N.W. 2d 72, 74 (Iowa 1988). Thus we hold that unless the department elects to equalize the tax burden and federal retirees by retroactively imposing comparable taxes on state retirees, it must authorize refunds to those taxpayers, like Hagge, who timely filed amended returns within the limitation period. The district court was correct in so ruling.

Finally, we consider the department's request that it be permitted to pay the required refunds on

an installment basis, with interest, over a four-year period. Hagge does not resist forbearance, observing in accordance with McKesson that serious economic consequences might reasonably impact the "form of and fine-tuning [of] the relief to be provided." See McKesson, 496 U.S. at 45, 110 S. Ct. at _____, 110 L. Ed. 2d at 41. Under the unique facts of this case, we believe the proposal is reasonable.

Accordingly we affirm the judgment of the district court, modified to permit payment of the required refunds, with interest, over a period of four years.

AFFIRMED AS MODIFIED.

All justices concur except Schultz and Carter, JJ., who take no part.

On August 24, 1993 the Iowa Supreme Court issued the following order pursuant to petition for rehearing in the Arlo Hagge decision of July 21, 1993:

IN THE SUPREME COURT OF IOWAA

NO. 92-1377

CORRECTION NOTICE

ARLO H. HAGGE,

Appellee,

vs.

IOWA DEPARTMENT OF REVENUE AND FINANCE,

Appellant.

Appellant and appellee have each filed petitions for rehearing. With the approval of the court, the author or the opinion filed July 21, 1993, has amended page 11 of the opinion by deleting the

first full sentence on the page and substituting therefore the following sentence:

> Thus we hold that in order to equalize the tax burden on state and federal retirees, the department must authorize refunds to those taxpayers, like Hagge, who timely filed amended returns within the limitation period.

With this amendment considered, the petitions for rehearing are denied. A revised page 11 is attached.

Dated this 24 day of August, 1993.

Revised page 11 is as follows:

at 26-27 accord Burlington N. R.R. Co. v. Board of Supervisors, 418 N.W. 2d 72, 74 (Iowa 1988). Thus we hold that in order to equalize the tax burden on state and federal retirees, the department must authorize refunds to those taxpayers, like Hagge, who timely filed amended returns within the

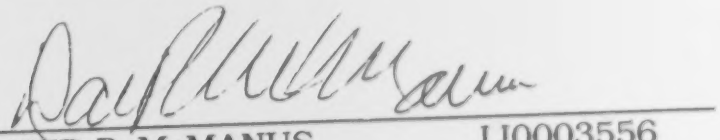
limitation period. The district court was correct in so ruling.

Finally, we consider the department's request that it be permitted to pay the required refunds on an installment basis, with interest, over a four-year period. Hagge does not resist forbearance, observing in accordance with McKesson that serious economic consequences might reasonably impact the "form of and fine-tuning [of] the relief to be provided." See McKesson, 496 U.S. at 45, 110 S. Ct. at 2254-55, 110 L. Ed. 2d at 41. Under the unique facts of this case, we believe the proposal is reasonable.

Accordingly we affirm the judgment of the district court, modified to permit payment of the required refunds, with interest, over a period of four years.

AFFIRMED AS MODIFIED.

All justices concur except Schultz and Carter, JJ., who take no part.



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(2)

Supreme Court, U.S.
FILED
OCT 28 1993
OFFICE OF THE CLERK

No. 93-562

In The

Supreme Court of the United States

October Term, 1993

E.J. McMANUS AND
ALL OTHERS SIMILARLY SITUATED,

Petitioners,

v.

STATE OF IOWA, IOWA DEPARTMENT OF
REVENUE AND FINANCE AND GERALD BAIR,

Respondents.

Petition For Writ Of Certiorari
To The Supreme Court Of Iowa

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether Petitioner's claims are moot.

2. Whether the Iowa Supreme Court decision was based solely on state law questions regarding the proper procedure to follow when seeking an Iowa tax refund.

3. Whether Petitioner is seeking review of issues which were not decided by the Iowa Supreme Court.

4. Whether the Iowa Supreme Court decision was correct in finding that the lower court properly dismissed Petitioner's case because he had failed to exhaust administrative remedies.

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OPINIONS BELOW

It should be noted that among the technical corrections to the Iowa Supreme Court's opinion which were filed on July 21, 1993, by Justice Larson, the author of the Court's opinion, was one which changed the first complete sentence on page 60 of the Petition for Writ of Certiorari. That sentence of the Iowa Supreme Court's opinion now reads, "The district court properly dismissed the claim under § 1983 because there are adequate state administrative remedies, and McManus failed to exhaust them." *McManus v. Dept. of Revenue and Finance*, 499 N.W.2d 726, 728 (Iowa 1993).

ADDITIONAL STATUTES INVOLVED

In addition to provisions included in the Petition's appendix, the following Iowa statutes are relevant.

Iowa Code § 421.10 (1991) Appeal period – denial of taxpayer's claim.

> The appeal period for revision of assessment of tax, interest, and penalties set out under section 422.28, 422.54, 452A.64, 453A.29, or 453A.46 applies to appeals to notices from the department denying changes in filing methods, denying refund claims, and denying portions of refund claims for the tax covered by that section.

Iowa Code § 422.28 (1991) Revision of tax.

> A taxpayer may appeal to the director for revision of the tax, interest or penalties assessed at any time within sixty days from the date of the

notice of the assessment of tax, additional tax, interest or penalties. The director shall grant a hearing and if, upon the hearing, the director determines that the tax, interest or penalties are excessive or incorrect, the director shall revise them according to law and the facts and adjust the computation of the tax, interest or penalties accordingly. The director shall notify the taxpayer by mail of the result of the hearing and shall refund to the taxpayer the amount, if any, paid in excess of the tax, interest or penalties found by the director to be due, with interest after sixty days from the date of payment by the taxpayer at the rate in effect under section 421.7 for each month or a fraction of a month. The director may, on the director's own motion at any time, abate any portion of tax, interest or penalties which the director determines is excessive in amount, or erroneously or illegally assessed. The director shall prepare quarterly reports, which shall be included in the annual statistical reports required under section 422.75, summarizing each case in which an abatement of tax, interest or penalties was made under this section, but a report shall not disclose the identity of the taxpayer.

STATEMENT OF THE CASE

At page 13 of McManus' Petition for Writ of Certiorari, he states that the Iowa Department of Revenue and Finance (Department) refused to hear his case. In reality, the Department had simply not yet acted on McManus' refund claim. It had neither allowed nor denied the refund, just as it had not acted on thousands

of other federal retirees' refund claims. At no time did McManus formally ask the Department to act on his claim nor did he ever ask a court to order the Department to act.

At page 14 of McManus' Petition for Writ of Certiorari, he states that Arlo Hagge brought the same claim in Iowa District Court but the Department agreed in writing to hear Hagge's claim. Mr. Hagge did not, however, go directly into District Court without first exhausting his administrative remedies. As set forth in the Iowa Supreme Court's opinion in *Hagge v. Iowa Department of Revenue and Finance*, No. 90-20-2-0216 (Iowa Sup. Ct. July 21, 1993), which is included in the Petition's appendix, the Department issued a letter denying Arlo Hagge's claim for refund for Iowa income taxes attributable to federal pension income. (Pet. App. 65). Hagge timely filed a Protest to the denial of refunds. The parties submitted the contested case directly to the Director of Revenue and Finance based on a stipulated factual record. All issues were presented to the Director for purposes of satisfying the requirement of exhaustion of administrative remedies. The Order of the Director was issued. Arlo Hagge then filed a judicial review action in Iowa District Court. Unlike McManus, the Petitioner in this case, Arlo Hagge, did not file a petition for judicial review in District Court until *after* he had exhausted his administrative remedies.

SUMMARY OF THE ARGUMENT

McManus' claim for recovery of income taxes is moot. As a result of the Iowa Supreme Court's recent decision in *Hagge v. Iowa Department of Revenue and Finance*, Docket No. 90-20-2-0216 (Iowa Sup. Ct. July 21, 1993), as revised on August 24, 1993, McManus will be refunded whatever tax he paid on federal pension income for which he timely filed refund claims. (See Petition App. 82).

Review of the Iowa Supreme Court's decision does not present an important question of federal law. The Iowa Supreme Court's decision was based solely on the required state procedures for getting into state district court to challenge state agency action. No federal questions were decided by the lower court.

The issues Petitioner presents regarding the availability of a class action and of a remedy under 42 U.S.C. § 1983 were never decided by the Iowa Supreme Court. The Iowa Supreme Court decided that McManus' suit was premature because he had not exhausted administrative remedies. The Court stated that because the suit was premature, the additional issues that rested on McManus' ability to maintain the action were moot. (Petition App. 60).

The District Court's decision to dismiss Petitioner's lawsuit, which was affirmed by the Iowa Supreme Court, was correct. Iowa law requires that a taxpayer exhaust his administrative remedies available through the Department before seeking judicial review of Department action. Iowa Code sections 17A.19(1) and 422.29(1). McManus had allegedly filed a refund claim with the Department.

The Department, however, never denied his claim. Therefore, the only agency action that McManus could have complained about and sought judicial review of at the time of his District Court lawsuit was the Department's failure to act on his refund claim. *See* Iowa Code § 17A.2(9)(1991) ("agency action" includes "a failure to act, or any other exercise of agency discretion or failure to do so, or the performance of any agency duty or the failure to do so"). His "Petition for Judicial Review" did not, however, present the issue of the Department's failure to act on his refund claim.

REASONS TO DENY THE PETITION

I. PETITIONER'S CASE IS MOOT, BECAUSE THE DEPARTMENT WILL BE PAYING PETITIONER AND OTHER FEDERAL RETIREES WHO FILED TIMELY REFUND CLAIMS THE TAX REFUNDS SOUGHT BY PETITIONER.

McManus' claim for recovery of income taxes paid which were unconstitutional under *Davis v. Michigan Department of Treasury*, 489 U.S. 803 (1989), is moot. The Iowa Supreme Court has already decided all relevant legal issues regarding McManus' right to a refund in its recent decision in *Hagge v. Iowa Department of Revenue and Finance*, Docket No. 90-20-2-0216 (Iowa Sup. Ct. July 21, 1993), as revised on August 24, 1993. (This decision, including the revision, is set forth at pages 62-83 of the Petition's appendix.)

It is clear from the opinion in *Hagge*, combined with this Court's decision in *Barker v. Kansas*, 112 S.Ct. 1619

(1992) (military retirees had to be treated the same as state retirees with regard to the taxation of retirement income), that *all* federal retirees who filed timely refund claims will be refunded the Iowa income tax paid on their federal retirement income. The Iowa Supreme Court stated:

> Thus we hold that in order to equalize the tax burden on state and federal retirees, the department must authorize refunds to those taxpayers, like Hagge, who timely filed amended returns within the limitation period.

(Pet. App. 82). The Department has every intention of complying with *Hagge* and paying McManus' claimed refund of Iowa income tax paid on federal pension income. The only reason McManus has not already received his money is that the Department is waiting for the Iowa Legislature to tell it whether to pay the approximately $45 million in refunds all at once or to pay it in installments covering up to four years, as allowed by the Court in *Hagge*. *See* Pet. App. 83. McManus has absolutely nothing to gain by pursuing his case. He will be receiving part, if not all, of his refund within a year and will have received his entire refund amount, with interest, within four years.

II. THE IOWA SUPREME COURT'S DECISION AFFIRMING THE DISTRICT COURT'S DISMISSAL OF PETITIONER'S TAX REFUND ACTION DOES NOT PRESENT ANY IMPORTANT QUESTIONS OF FEDERAL LAW.

The Iowa Supreme Court's decision which Petitioner seeks to have reviewed by certiorari was based solely on

the procedures required by state law for getting into state district court to challenge state agency action. No federal questions were decided by the lower court. The Iowa Supreme Court relied upon Iowa Code section 17A.19 (1991) and prior Iowa caselaw regarding that Iowa Code section. *See* Pet. App. 54-60.

III. THE ISSUES REGARDING THE AVAILABILITY OF A CLASS ACTION AND OF A REMEDY UNDER 42 U.S.C. § 1983 WERE NEVER DECIDED BY THE IOWA SUPREME COURT.

The issues Petitioner presents regarding the availability of a class action and of a remedy under 42 U.S.C. § 1983 were never decided by the Iowa Supreme Court. The Iowa Supreme Court decided that McManus' District Court lawsuit, including the 42 U.S.C. § 1983 claim, was premature because he had not exhausted administrative remedies as required by Iowa Code section 17A.19 (1991). (Pet. App. 59-60 and *McManus*, 499 N.W.2d 726, 728 (Iowa 1993)). Having decided that the § 1983 claim was properly dismissed because appropriate procedures had not been followed in presenting the issue, the Iowa Supreme Court did not decide the merits of the claim.

Similarly, the issue of the availability of a class action lawsuit was not decided by the Iowa Supreme Court. The Court stated:

> Because we conclude that any suit attempting to recover the refund or damages under § 1983 is premature for the reasons discussed, additional issues raised by McManus that rest on his ability to maintain this action are moot.

(Petition App. 60). The availability of a class action was one of the issues not reached by the Iowa Supreme Court.

IV. THE IOWA SUPREME COURT DECISION WAS CORRECT IN FINDING THAT THE LOWER COURT PROPERLY DISMISSED PETITIONER'S CASE BECAUSE HE HAD FAILED TO EXHAUST ADMINISTRATIVE REMEDIES.

McManus was not entitled to bring an action in Iowa District Court seeking the remedies requested in his "Petition For Judicial Review." An Iowa District Court reviewing action of a state agency exercises only appellate jurisdiction. It has no original authority to declare the rights of the parties or the applicability of any statute or rule. *Teleconnect Co. v. Iowa State Commerce Com'n*, 366 N.W.2d 515, 518-19 (Iowa 1985). McManus' refund claim had not been denied by the Department. Therefore, McManus could not challenge the denial of his refund claim. The only remedy McManus could have sought in a court action at the time he filed his Petition for Judicial Review was a ruling that the Department had to immediately act upon his refund claim rather than awaiting the outcome of *Hagge* and federal retiree cases which were before this Court. *See* Iowa Code § 17A.2(9) (1991) ("agency action" includes "a failure to act, or any other exercise of agency discretion or failure to do so, or the performance of any agency duty or the failure to do so"). His "Petition for Judicial Review" did not, however, present the issue of the Department's failure to act on his refund claim.

The provisions in Iowa Code § 17A.19 constitute the exclusive means of judicial review of agency action in Iowa. *Salsbury Laboratories v. Iowa, Etc.*, 276 N.W.2d 830, 833 (Iowa 1979). Under § 17A.19(1), a party must have exhausted all adequate administrative remedies before being entitled to seek judicial review of final agency action. Even an inadequate administrative remedy must be exhausted if judicial review from the final agency action is adequate. *Salsbury Laboratories v. Iowa, Etc.*, 276 N.W.2d 830, 837 (Iowa 1979). The exhaustion of remedies rule "prevents a premature transfer to courts of duties imposed by law on administrative agencies and prevents interruption of administrative process, insuring an orderly procedure." *Dehning v. Eads*, 201 N.W.2d 454, 455-56 (Iowa 1972).

The issues to be decided regarding McManus' refund claim directly affected matters pending before the Department. Therefore, administrative exhaustion was to precede the judicial inquiry regarding those issues. *See Shell Oil Co. v. Bair*, 417 N.W.2d 425, 429 (Iowa 1987) ("[W]here the constitutional issue sought to be raised directly affects a matter pending before an agency, administrative exhaustion should ordinarily precede a judicial inquiry into the statute's validity."). As stated in *Shell* with respect to facial constitutional issues, the issues to be decided in determining whether federal retirees were entitled to the relief sought by McManus are more effectively presented for adjudication based upon a specific factual record developed before the agency entrusted with the determination of the adjudicative facts. *Id.* at 430.

There is an exception in state tax matters to the general rule prohibiting exhaustion requirements for § 1983 actions. *Hogan v. Musolf*, 471 N.W.2d 216, 222 (Wis. 1991), *cert. denied*, 112 S.Ct. 867 (1992) (federal retirees' case based on *Davis*). A 42 U.S.C. § 1983 challenge to state taxation is not allowed in state courts where there is an adequate state administrative remedy available. *See, e.g., id.; Nutbrown v. Munn*, 811 P.2d 131 (Or. 1991), *cert. denied*, 112 S.Ct. 867 (1992) (federal retirees' case based on *Davis*). "[S]tate administrative tax procedures should not be undermined by sec. 1983 claims." *Hogan*, 471 N.W.2d at 222. Non-interference with state taxing schemes was Congress' primary purpose in enacting the Tax Injunction Act preventing challenges to state taxes in federal court. *Id.* at 222-23; *Fair Assessment in Real Estate v. McNary*, 454 U.S. 100, 110 (1981). "That purpose is defeated regardless of whether a state court or federal court entertains a sec. 1983 claim without requiring the plaintiffs to resort to the state's administrative procedures." *Hogan*, 471 N.W.2d at 223.[1]

A state's exhaustion requirement is valid if the state remedies are "plain, adequate, and complete." *Id.* at 223. Iowa's administrative remedies meet this standard in the same way that Wisconsin's administrative remedies did in the *Hogan* case. The aggrieved taxpayer can apply for a refund with the Department. If the Department denies the refund claim, Iowa law provides for a full hearing

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[1] The jurisdictional prohibition of the Tax Injunction Act applies to civil rights actions brought under 42 U.S.C. § 1983. *Rosewell v. LaSalle National Bank*, 450 U.S. 503, 67 L.Ed.2d 464, 101 S.Ct. 1221 (1981).

before the agency which allows the taxpayer to raise any and all legal arguments, including constitutional objections, concerning the request for income tax refunds. *See* Iowa Code §§ 421.10 and 422.28 (1991). The Department's decision is reviewable by the courts on judicial review. Iowa Code §§ 17A.19 and 422.29(1) (1991). This procedure "offers to the reviewing courts the benefit of the agency's findings and conclusions in an area in which agencies have special expertise." *Hogan*, 471 N.W.2d at 223. The fact that the same relief cannot be obtained under the state administrative remedies as can be obtained in a section 1983 action does not cause the remedy to be inadequate. *Id.* at 223; *Nutbrown*, 811 P.2d at 141. If taxpayers receive the relief they would be entitled to under an appropriate, constitutional reading of the Iowa tax system, they have no further claim. *Nutbrown*, 811 P.2d at 141.

McManus has "not yet suffered a harm that would require any relief under § 1983, and will not have suffered such harm unless [his] administrative remedies do not give [him] all [he] claim[s] under [his] interpretation of the tax laws and the United States Constitution." *Nutbrown*, 811 P.2d at 142. As discussed previously with regard to the mootness of the issues being raised, McManus will receive the refund he seeks. The Department will be paying all timely claims for refunds of Iowa income tax paid on federal pension income during the time period when state retirement income was exempt. If, by exhausting his administrative remedies, a taxpayer obtains the relief under the tax laws that he seeks, the need for § 1983 litigation vanishes. "That is a sufficient

reason to require exhaustion." *Nutbrown*, 811 P.2d at 142-43.

CONCLUSION

For the above stated reasons, the Department of Revenue and Finance respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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